

1 17th.

2 THE COURT: Did they file one by October 17th?

3 MR. BENNETT: They filed a privilege log by
4 October 17th.

5 THE COURT: And is this document on it?

6 MR. BENNETT: No, Judge.

7 THE COURT: Wait. That's the rule. Sorry. All
8 right, let's go. I also think, after reading this brief,
9 reading the papers, there's been a prima facie showing of an
10 exception to waive the privilege. It's a crime-fraud issue,
11 isn't it? RICO is a crime.

12 You have the lawyers inhouse that are participating
13 in the crime, according to the allegations and the showing
14 that's been made, because they drafted these documents that are
15 allegedly the misrepresentations that were made to courts all
16 over the country. Why isn't that a waiver of the privilege
17 even if you have a privilege, Mr. Anthony?

18 MR. LYNCH: I can address that, Judge. One
19 fundamental issue in this case, and Mr. Bennett brought it up
20 during the initial pretrial conference, and we probably should
21 have been more specific about it. There was an affidavit, and
22 attorney generals are investigating Midland about the old
23 affidavit. There was a class action in Ohio pertaining --

24 THE COURT: And it was drafted by lawyers.

25 MR. LYNCH: It was drafted by lawyers.

1 THE COURT: Inside the house.

2 MR. LYNCH: No question, Judge. This case pertains
3 to a new affidavit --

4 THE COURT: Drafted by the lawyers inside the house;
5 right?

6 MR. LYNCH: With outside counsel.

7 THE COURT: But it's drafted with the assistance of
8 lawyers.

9 MR. LYNCH: I do not disagree with that.

10 THE COURT: And it is alleged to be fraudulent.

11 MR. LYNCH: It is alleged to be fraudulent. That
12 almost identical affidavit by -- I don't know -- four federal
13 courts has been held to be a valid affidavit. His allegations
14 in just saying, oh, I have a RICO case and they didn't file a
15 motion to dismiss is not prima facie evidence of fraud.

16 THE COURT: You know, the problem, Mr. Lynch, you
17 need to come to the reality that your client has some troubles.

18 All right, Mr. Bennett, he says that all of these
19 affidavits -- that this affidavit, the one you are relying on,
20 has been approved as appropriate by four different federal
21 courts; is that right?

22 MR. LYNCH: Judge, just for the record, I'm not
23 saying word for word.

24 THE COURT: No, no. That's what you said.

25 MR. LYNCH: No, Judge.

1 THE COURT: You said this affidavit, and you held it
2 up.

3 MR. LYNCH: No, Judge --

4 THE COURT: Mr. Lynch, do you want to correct it?

5 MR. LYNCH: I do want to correct it.

6 THE COURT: All right.

7 MR. LYNCH: What I'm saying is the substance of this
8 affidavit saying you can have an affidavit with someone that
9 has personal knowledge of business records, not of the debt, of
10 business records, and I've got four cases right here in front
11 of me and I can hand up to the Court, and I'm not saying the
12 affidavits are word for word the same. They're not.

13 MR. BENNETT: They're not Midland affidavits.

14 MR. LYNCH: They're not Midland affidavits.

15 MR. BENNETT: He's just arguing, Judge, that some
16 courts have said that a business record's affidavit can meet
17 certain standards. No court has ever ruled that Midland's
18 affidavit, which varies only slightly from the one that was --

19 THE COURT: Excuse me. Mr. Lynch, I understood from
20 your statement that you meant that a court had ruled Midland's
21 affidavits were sufficient. So from now on, please choose your
22 words carefully.

23 MR. LYNCH: Okay, Judge, and I did not mean to
24 indicate that.

25 THE COURT: But you did indicate that whether you

1 intended to or not.

2 MR. LYNCH: I apologize.

3 THE COURT: I don't think you would misrepresent
4 anything to the Court, but I'm telling you, I pay attention to
5 what you all say and rely on it.

6 MR. LYNCH: I apologize.

7 THE COURT: Now, all right, let's go.

8 MR. BENNETT: Judge, on Exhibit A, we had withdrawn
9 subsequent to this and noted in Document 124, the second motion
10 to compel, requests six and seven.

11 THE COURT: Requests six and seven are out; is that
12 right?

13 MR. BENNETT: Yes, Your Honor.

14 THE COURT: All right.

15 MR. BENNETT: Eight.

16 THE COURT: What about eight?

17 MR. BENNETT: Judge, the defendant refuses to give --
18 with respect to eight, we have asked for, and the defendant has
19 been investigated and is currently being investigated by
20 multiple attorneys general and has produced to those various
21 attorneys general offices documents that we are asking for, the
22 origins of the affidavit, other explanations.

23 If the defendant is going to claim or represent, for
24 example, to the North Carolina Attorney General's office that
25 this is what our affidavit process is, and they have a witness

1 who is the general counsel in this case that is explaining it
2 entirely differently, we are entitled to discover that
3 substantive --

4 THE COURT: Have they provided what's in request
5 number eight?

6 MR. BENNETT: No, sir, they've not.

7 THE COURT: Is it objected to on the privilege log
8 they filed on October 17th?

9 MR. BENNETT: No, sir. And I believe that they
10 withdrew any privilege basis for an objection. Their current
11 position simply says they'll agree to produce
12 non-consumer-specific, non-state-specific documents that were
13 produced to government agencies or the FTC to the extent they
14 are also implicated by the claims and defenses pled in this
15 action.

16 Midland does not agree to withdraw its objections.
17 Their position is it's continuing of a relevance objection.
18 They're saying that what they would have told North Carolina is
19 not relevant to Virginia.

20 THE COURT: All right. Let me hear their position.
21 There's no privilege issue because they've withdrawn the
22 privilege.

23 MR. ANTHONY: Your Honor, I think a couple points.

24 THE COURT: Not relevant is your objection; is that
25 right?

1 MR. ANTHONY: I'm sorry?

2 THE COURT: Your objection is a lack of relevance.

3 MR. ANTHONY: It is, but I think it's also important
4 -- to the best of our knowledge, all of the information that
5 has been provided to any regulatory agency that relates to the
6 current affidavit process had been produced. We would agree to
7 produce that, and we are continuing to see if there's anything
8 else that has to be produced.

9 THE COURT: Are you drawing a distinction between the
10 past affidavit and the current affidavit?

11 MR. ANTHONY: Yes, sir.

12 MR. BENNETT: We alleged they are identical,
13 substantively identical. They move a comma. That is
14 previously -- they said, I have personal knowledge that this
15 debt is owed.

16 Now it says, I have personal knowledge this debt is
17 owed or of the business records, and then the explanation that
18 you don't see in the affidavit from the PowerPoint we have
19 forced from them says, when you say you have personal knowledge
20 of the account records, you're not saying you have personal
21 knowledge of the account records. You're saying you have
22 personal knowledge of this screen you look at, and there is no
23 substantive distinction. We think in fact --

24 THE COURT: Doesn't that depend upon -- the validity
25 of that statement depend upon what was on the screen?

1 MR. BENNETT: We know what was on that screen,
2 though. No business records are on that screen. They've
3 defined business record to mean a variable within a field. So,
4 for example, Gilbert James, Gilbert, in its definition, is a
5 business record. James is defined as a business record as
6 opposed to credit card application is a business record,
7 account payment history is a business record.

8 THE COURT: None of that is a business record.
9 That's a name. There's no business record that has anything to
10 do with that.

11 MR. BENNETT: Yes, sir, we agree.

12 THE COURT: The issue, I suppose, would be whether
13 what is on their screens constitute a business record, I would
14 think.

15 MR. BENNETT: It's not screens. It's a specific one
16 screen that its affiant uses. It's called an affidavit
17 validation screen. The affidavit is generated from the local
18 Virginia debt collectors or the debt collectors in whatever
19 state. It spits out of the computer every morning at Midland,
20 and then they get a stack, the affiant gets a stack of these
21 that are randomly -- like ten percent goes to this affiant, and
22 then that affiant's job is to look on the affidavit that's
23 already printed with their name and all the
24 I-have-personal-knowledge, get the account number that's
25 printed out, input it onto this one screen, and then about

1 eight fields, the field I just described, name, address, and so
2 forth pops up. Their job, according to the procedure, is to
3 make sure that the name that's on that screen is the name
4 that's in the affidavit.

5 THE COURT: So the question would become whether
6 that's a business record or not.

7 MR. BENNETT: Sorry?

8 THE COURT: That is a question as to whether or not
9 that is or is not a business record, but I don't have to decide
10 that to decide whether it's discoverable, do I?

11 MR. BENNETT: No, sir, you don't.

12 THE COURT: Your objection is you don't want to
13 produce this as to the past affidavits.

14 MR. ANTHONY: Yes.

15 THE COURT: But you have agreed to produce them as to
16 all of the current affidavits.

17 MR. ANTHONY: Not only that, but to the best of our
18 knowledge, we have done so.

19 THE COURT: Is that correct? Have they produced them
20 as to the current affidavits?

21 MR. BENNETT: If by that they mean zero records have
22 been produced -- they produced zero in response to this
23 request. That is --

24 THE COURT: They said everything has been produced
25 that's been provided to any of these agencies, et cetera. He

1 says you didn't produce any documents. There's something amiss
2 there.

3 MR. BENNETT: The point is that they have not
4 produced --

5 THE COURT: I was asking Mr. Anthony. You represent
6 they haven't produced anything, you say you have. How am I to
7 decide that?

8 MR. ANTHONY: Well, Your Honor, for example, we have
9 other requests from Mr. Bennett that ask for things like your
10 affidavit training process, your FCRA manuals, all of these
11 things that describe the current affidavit process. They were
12 already asked for by other request --

13 THE COURT: Let me make clear what you are going to
14 produce. Objection to relevance is overruled as to the old
15 one. You produce everything, and you produce -- I'm sure that
16 your client kept a record of what it produced to each agency or
17 office that it produced to. You -- and if you produced it to
18 ten different attorney generals, then you produce it to Mr.
19 Bennett in all ten of those, for example. Do you understand?

20 You will produce everything that was produced in the
21 form it was produced, numbers and everything, to the attorney
22 general of this state, that state, that state, any government
23 agency, the FTC, on this topic, the creation, use, or signing
24 of collection affidavits with the exclusion of documents that
25 pertain solely to specific consumer. Now do you understand the

1 objection to number eight has been overruled?

2 MR. ANTHONY: Your Honor, please note our objection
3 to the Court's ruling, but just to be clear, we are not being
4 told by the Court, nor is Mr. Bennett asking for anything that
5 is consumer-related to a particular individual other than Mr.
6 James; correct?

7 THE COURT: What does your exclusion mean in Exhibit
8 A, Mr. Bennett? That sounds to me like what you asked for.

9 MR. BENNETT: If Ms. Smith or John Doe wrote to the
10 North Carolina attorney general and said, I have a problem with
11 Midland and there was an exchange about John Doe, we're not
12 asking for that. We've explained that in the meet-and-confer.
13 We are simply asking for these --

14 THE COURT: Mr. Bennett, are you asking -- if they
15 produced to a state agency affidavits used with respect to John
16 Doe, are you asking about that affidavit?

17 MR. BENNETT: No, sir. Not the John Doe specific.
18 We are asking for --

19 THE COURT: You mean not with John Doe's name in it.

20 MR. BENNETT: Yes, sir.

21 MR. ANTHONY: That's my understanding.

22 THE COURT: I cannot believe that you're doing that,
23 because I would think that would make their job very difficult,
24 but if they're happy with that limitation, then you can live
25 with it. Are you happy with that limitation?

1 MR. ANTHONY: It is what it is, Your Honor. There
2 are obviously privacy issues that are involved in that --

3 THE COURT: There are no privacy issues involved with
4 that. All you have to do is white out the name of the person,
5 put in a letter or number that says A, one, two, three, or C,
6 or whatever it is, and then keep a record of it in the event --
7 so that we know exactly who those people are in the event we
8 need to have them. There isn't any privacy issue that cannot
9 be addressed.

10 MR. ANTHONY: But Mr. Bennett's not asking for that.
11 We understand the Court's ruling, and we will honor the Court's
12 ruling. Please note our objection to that.

13 THE COURT: Request number nine.

14 MR. BENNETT: Judge, we can address the -- nine
15 through 11 are similar, but we've withdrawn 11, so nine and
16 ten, ask for narrowly defined chunks of the specific
17 defendant's employee email Outlook boxes. That is, we've taken
18 the deposition of these witnesses --

19 THE COURT: Do you have a time frame on this? I
20 don't see any time frame on this thing.

21 MR. BENNETT: Judge, we don't have a time frame --

22 THE COURT: Suppose they've been dealing with Brandon
23 Black -- when did your company start business?

24 MR. ANTHONY: It's been more than a couple years,
25 Your Honor.

1 THE COURT: Well, how long has it been?

2 MR. BENNETT: Judge, we've already agreed --

3 MR. ANTHONY: Ten or 15 years, Your Honor.

4 THE COURT: Suppose that in 2000 they were
5 communicating with Brandon Black. Are you asking for that, or
6 have you -- I don't see any time limit in this one.

7 MR. BENNETT: Well, Judge --

8 THE COURT: Yes or no? Time limit or not?

9 MR. BENNETT: There is not a time limit other than
10 that it wouldn't be on their email Outlook box.

11 THE COURT: I don't understand that.

12 MR. BENNETT: Well, we're not asking for them to
13 scour all the records in the history of the company. We are
14 saying --

15 THE COURT: Usually the way you limit that is for
16 emails dated on or after a date and on or before another date.
17 That's how you do it.

18 MR. BENNETT: Yes, sir, but each of these employees
19 worked for a very narrow window of time over the last, really,
20 three or four years. None of them are long-term employees.

21 THE COURT: That's fine, but I look at this, and I
22 hear --

23 MR. BENNETT: Yes, sir.

24 THE COURT: Have you agreed to a time with them?

25 MR. BENNETT: We have not.

1 THE COURT: Are you willing to agree --

2 MR. BENNETT: Yes, sir, we are.

3 THE COURT: What time limit are you going to agree
4 to?

5 MR. BENNETT: We would agree to July 1, 2009, through
6 the present. January 1, I'm sorry, 2009, through the present.

7 THE COURT: All right, any objection to that?

8 MR. ANTHONY: Your Honor, assuming we take the rest
9 of that, we would agree --

10 THE COURT: Assuming what?

11 MR. ANTHONY: Assuming we agree on the other scope of
12 the searches which we have some other objections to, we would
13 say July 1 is a more appropriate date. Midland did not even
14 get Mr. James's account until mid July, 2009.

15 THE COURT: But the conduct respecting the affidavits
16 can be reflected in what was going on with respect to
17 affidavits before then. So I don't understand what your limit
18 is. What's the period covered by the suit?

19 MR. BENNETT: It's not a class action, but we're
20 alleging it's an ongoing, continuing scheme, racketeering
21 scheme that goes back into the 2006 period. We've already
22 agreed to January 1, '09, in some of our other compromises, so
23 I'm trying to be consistent, but we certainly would want --

24 THE COURT: That period is acceptable, it's
25 reasonable. It's pertinent and probative of the state-of-mind

1 components of the RICO charges and the validity vel non of the
2 processes. What other objections are there to request number
3 nine?

4 MR. ANTHONY: Your Honor, there's a couple. One of
5 them has to do with the subject matter of this. If you look at
6 request from number nine, continuing on, for example, number 11
7 has no subject matter.

8 THE COURT: 11 he's withdrawn. 11 is out. I'm
9 interested in nine and ten.

10 MR. ANTHONY: Your Honor, if you look at ten --

11 THE COURT: Are there any other objections to nine?

12 MR. ANTHONY: Yes. Search term and privilege.

13 THE COURT: Search term is affidavit within the
14 subject or body of the email.

15 MR. ANTHONY: Correct.

16 THE COURT: And any of the following individuals in
17 the to, from, cc, or bcc fields.

18 MR. ANTHONY: Your Honor, they're in the affidavit
19 business. It's part of what they do, so we've got to cull
20 through all of this to figure out if there's anything that
21 might tie in to what their claims are. We've offered five
22 different variations of that to attempt to narrow that scope
23 which would narrow that scope --

24 THE COURT: You have to show -- is your objection
25 it's burdensome?

1 MR. ANTHONY: It is.

2 THE COURT: What is the basis for your showing that
3 it's burdensome?

4 MR. ANTHONY: We provided an affidavit to the Court
5 that would be approximately 54,000 emails and approximately
6 1,100 attorney hours to review it. That's burdensome.

7 MR. BENNETT: Judge, it would take an hour to cut
8 that onto a CD. Their concern is they want to pre-edit those
9 which is something they should have raised either with me or
10 with the Court during the privilege log period.

11 THE COURT: Have these been objected to as
12 privileged?

13 MR. BENNETT: They've not been listed, even described
14 as a category such as emails, has not been included within the
15 privilege log. It's worked for us. We're the ones that have
16 to go through and sort it out.

17 THE COURT: Do you think it's okay for them to look
18 at them first before they turn them over so they can understand
19 if there's anything privileged in there? For example, there
20 may be something that doesn't -- if it has to do with the
21 affidavit process, it may not be privileged, but it may be
22 something else such as advice about how to do something in a
23 lawsuit that is involved in an affidavit, and I would think
24 they have a right to look at it. Wouldn't you?

25 MR. BENNETT: That's an issue --

1 THE COURT: Why is it 54,000 documents and a thousand
2 hours of lawyer time? What does lawyer time go for these days?
3 \$400 an hour, \$200 an hour, what?

4 MR. BENNETT: It depends on the lawyer, Your Honor.

5 MR. ANTHONY: That's Mr. Bennett's rate.

6 MR. BENNETT: Judge, this is an issue that should
7 have been included within the basis for the privilege objection
8 or some other indication. This information, in fact, the
9 amount of time that they're claiming itself was not even raised
10 until late December, and the distinction between producing --

11 THE COURT: Did they object to it as burdensome?

12 MR. BENNETT: Only within a long litany of it's
13 burdensome, it's irrelevant, it's overbroad, it's privileged,
14 it's confidential, just generic paragraph. There was no
15 explanation that this is going to cause us to have to review
16 this.

17 We certainly, Judge -- there is, to the extent that
18 it is privileged outside this case, they still have certain
19 clawback rights that they can avail themselves of, and they can
20 designate these as protected.

21 THE COURT: What's the damage to the plaintiff in
22 this case?

23 MR. BENNETT: Judge, the significance of his damages?
24 His damage is that his credit was destroyed, that he was sued,
25 that he's had to defend that --

1 THE COURT: What is the amount? They have between
2 250 an hour, 250,000, and 400,000 in costs to get this to you.

3 MR. BENNETT: His damages are not \$400,000, Judge, in
4 terms of actual damages. We think that the damage, the award
5 should be higher than that because of the exemplaries, but we
6 wouldn't represent to the Court that his actual damages are
7 going to be of the magnitude. We challenge the assertion of
8 this number, and the defendant --

9 THE COURT: Assertion of what number?

10 MR. BENNETT: Well, Judge, you have --

11 THE COURT: A thousand hours or 54,000 documents?

12 MR. BENNETT: Yes. Well, or even 54,000 documents.

13 THE COURT: Which do you challenge, or both?

14 MR. BENNETT: Both of them. They're email chains,
15 so, for example, one -- well, they've not been described so we
16 don't know except that typical email production is -- for
17 example, they have produced recently a handful of emails
18 exchanged with a third-party bank that came and inspected their
19 facility, and of those emails, they were scheduling dinner and
20 pickup at the airport, and each time an individual sent a
21 response, which is, yes, Joe, that looks great for me, that was
22 one email.

23 To the extent that their assertion is it will take X
24 number of hours to review all of these emails, they have to at
25 least tender to you or provide to us in a meet-and-confer

1 process some explanation of why that would be so. They haven't
2 described any emails, they haven't identified the existence of
3 the email box.

4 Take, for example, the Nancy Kohls, which is request
5 ten, I asked her at her deposition, do you use personal -- how
6 do you keep your email.

7 Outlook is the answer.

8 And do you use this for your personal use?

9 No.

10 Do you have folders, and, for example, some of these
11 individuals like Rita Melconian, I asked her at her deposition,
12 how do you organize your folders, and she indicated she does it
13 by state or she does it by firm at different points of time,
14 and so at a minimum, the defendant could have suggested in a
15 meet-and-confer, discuss any of the information that they're
16 suggesting now in their brief or in the letter immediately
17 before it, they could have suggested, well, look, we've checked
18 Rita Melconian's email box, she has five folders, one of them
19 says, you know, what fonts affidavits should be in or something
20 that clearly might not bear on something that material to us.
21 They could have suggested that to us, and we could have met and
22 conferred.

23 The question is would there have been a less
24 burdensome alternative on the defendant that the defendant
25 could have availed itself of by negotiating, by meeting and

1 conferring with us, and by discussing this prior to October --

2 THE COURT: That is a question, that is a factor, but
3 you filed what you filed. They deal with it as filed, and I
4 test it if you all aren't able to resolve it by comparing what
5 you have filed against the showing they have made, so I didn't
6 see any showing as to why it would take a thousand hours,
7 though. I'll let Mr. Anthony address that.

8 MR. ANTHONY: Your Honor, we attached to our
9 opposition, we attached a declaration from Mr. Rose, the 54,000
10 email records that were there. We also referenced the -- if we
11 were to use the modified search terms that we proposed, what
12 that would produce, and this is based upon personal knowledge
13 about what it would take to assimilate all of those. Based on
14 our experience, as we put in our papers, roughly 50 documents
15 an hour. That's how -- it was simply a math that went along
16 with that.

17 One of the things that we're not completely certain
18 of, and would I disagree with Mr. Bennett, you know, there's a
19 concept of emails, but then there are attachments that go along
20 with that, too, so we don't know the full scope of the
21 attachments of the emails that would go along with this. We
22 don't know the extent of where there's duplication, we don't
23 know the extent of where there's privilege.

24 THE COURT: Well, if you haven't done any looking at
25 those emails, how could you make any objection based on that?

1 You have to look at some of them.

2 MR. ANTHONY: Your Honor, I'm very confident that,
3 again, taking the request as it originally was given to us,
4 that there were irrelevant information in the email box for
5 Nancy Kohls. Mr. Bennett asked for every email in her inbox.
6 He withdrew that.

7 We have the same thing for Rita Melconian. He's
8 withdrawn that. At the time we made the objections, that was
9 what the request was, and now we're here -- to use an example,
10 number nine, number nine asks for an affidavit. We attempted
11 to negotiate with Mr. Bennett, and what he said was, no,
12 affidavit is it. So we did what we're supposed to, figure out
13 what the burden is --

14 THE COURT: I'm sorry, I'm coughing over you.

15 MR. ANTHONY: We took what...

16 THE COURT: He's narrowed it to what appears on
17 Exhibit A. Are you agreeable to that?

18 MR. ANTHONY: I'm sorry?

19 THE COURT: He's narrowed it as to nine and ten,
20 requests nine and ten as to what appears on Exhibit A to his
21 paper; do you agree to that?

22 MR. ANTHONY: It is my understanding that that's what
23 he has narrowed it to, Your Honor.

24 THE COURT: I say, do you agree to that?

25 MR. ANTHONY: We do not.

1 THE COURT: What is your objection to it as narrowed?

2 MR. ANTHONY: As narrowed, as is evidenced by the
3 affidavit, it would require the production of 54,000-plus
4 emails with attachments that would require, our best estimate,
5 1,100 hours to assimilate those, to review those, to figure out
6 privilege, all those kinds of things, and we believe that that
7 burden of hundreds of thousands of dollars is unfair, and
8 particularly where we can -- we've agreed to provide
9 alternative search terms which we think are reasonable --

10 THE COURT: What are they?

11 MR. ANTHONY: They are outlined in his statement,
12 Your Honor. We have affidavit within three of polic,
13 p-o-l-i-c, with an asterisk.

14 THE COURT: Police?

15 MR. ANTHONY: Yes, sir, because there's an issue of
16 identity theft and reporting -- I'm sorry, policy, reporting
17 about the policies, affidavit within three of procedure
18 asterisk, affidavit within three of form, affidavit within
19 three of template.

20 THE COURT: What is wrong with that?

21 MR. BENNETT: First --

22 THE COURT: What's wrong with those?

23 MR. BENNETT: I haven't seen the documents, but the
24 defendant is carving out -- it's choosing terms to avoid, we
25 believe, the production of documents that would be useful and

1 harmful and crafting search terms that are irrational. That
2 you would do within three of policy, basically what they're
3 saying is only the use of affidavit policy, affidavit
4 procedure, affidavit form, affidavit template, or the full
5 name, Gilbert James. Mr. James wouldn't matter, for example.

6 So it has to be -- it's this narrow, crafted, and
7 what their objection is is privilege which is the discussion we
8 should have had in October.

9 THE COURT: No.

10 MR. BENNETT: The burden -- the reason they're saying
11 burden --

12 THE COURT: We're not dealing with privilege now.
13 We're dealing with burden.

14 MR. BENNETT: No, sir, Judge. The burden, there are
15 two burdens. The first burden is the actual production and
16 giving them to us. They're not claiming that's a difficult
17 burden. Putting it on a DVD or CD and giving it to us is not a
18 challenge.

19 THE COURT: They're not. What they're saying is that
20 in order to first review them to determine whether they're
21 privileged.

22 MR. BENNETT: That's the privilege objection, Judge,
23 and they should have said early on -- they could have said in
24 October, emails.

25 THE COURT: But they didn't.

1 MR. BENNETT: They didn't.

2 THE COURT: Okay.

3 MR. BENNETT: Completely waived it, and they didn't
4 even raise this discussion. Even Mr. Rose, I never heard of
5 the man. He wasn't disclosed as a witness. His information
6 wasn't provided in the meet-and-confer process.

7 THE COURT: Who?

8 MR. BENNETT: The affiant that they're using to
9 claim.

10 THE COURT: I just didn't understand what you were
11 saying. All right, I see. Anything else?

12 MR. BENNETT: No, sir.

13 MR. ANTHONY: No, Your Honor.

14 THE COURT: The objection to the request number nine
15 and ten as narrowed in Exhibit A to the papers filed is
16 overruled. The production will be as required there.

17 MR. ANTHONY: Your Honor, if I may, I don't want to
18 beat the horse again. This is wrong. This is a significant
19 undertaking, and I understand the Court's rationale here, but
20 I'm thinking our client, because of virtue of getting sued, has
21 the benefit of having to spend \$400,000 on a goose chase to
22 satisfy Mr. Bennett, and that's wrong. It doesn't satisfy
23 requirements of Rule 26.

24 THE COURT: I think it does. Your client has been
25 using an affidavit that flatly is wrong and has been determined

1 to be wrong; right? It was. And now it's using another kind
2 of affidavit. It changed, and there's significant information
3 to be had in these files pertaining to what you knew, what you
4 were doing that has to do with the state of mind of your client
5 in, A, what it was doing, and, B, changing to what it was doing
6 and how that change is significant.

7 From what I've been able to tell, there's not a whole
8 lot of difference between the original affidavit and the ones
9 being used at this time, but I'm not sure of that. There may,
10 in fact, be reasons why the people who prepared this thought
11 that it was significant, and it may be important in the outcome
12 of the case. So I think it is, A, relevant; B, reasonably
13 calculated to lead to the discovery of admissible evidence; and
14 C, it is not unduly burdensome although it, the burden, is not
15 insignificant. I think that's the ruling in number nine and
16 ten.

17 Number 12.

18 MR. ANTHONY: Please note our objection, Your Honor.

19 MR. BENNETT: 12 is similar but it's not simply
20 email, but it is also a much more narrow topic.

21 THE COURT: How does all correspondence and all
22 email, how does that narrow -- I'm going according to how
23 you've narrowed it now.

24 MR. BENNETT: Yes, sir. Well --

25 THE COURT: It is included within your original

1 legal proceeding that's contrary expressly to this.

2 That's not right. We have relied on this. If the
3 shoe were on the other foot, you would dress me up and down if
4 I were to do that. If I were to take a document that I was
5 expressly told you cannot use this in another proceeding, and I
6 were to come in here and say, Judge, you know what, I want to
7 get these documents so I can use them in another proceeding,
8 you'd say, well, good luck in the other proceeding.

9 So I understand the Court's admonition about
10 reviewing the confidentiality designations. We made them in
11 good faith. I will commit to the Court we will go back and
12 look at them again to make sure of that, but to what end?
13 There's been no, to my knowledge, complaint by Mr. Bennett
14 about having any difficulty in how he proceeds to litigate this
15 case --

16 THE COURT: I'm going to refer these two motions to a
17 special master and let you all split the costs of them as to
18 whether there's any confidentiality or not. Don't you ever
19 present another confidentiality agreement to me that has that
20 provision in it.

21 Protective orders have overwhelmed the federal
22 courts, and they have resulted, in essence, in litigation being
23 conducted in secret, and the Fourth Circuit abhors that, the
24 Supreme Court abhors it, and there is a significant body of law
25 that is gathering against the sealing of documents from one